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If You Have a Will

Only by making a will or some other advance property transfer arrangement can a person set up his own laws of descent and make sure that his wishes for the distribution of his property will be carried out after his death.

by John C. O'Byrne and John F. Timmons

A WILL IS a written document in which a person states what he wishes to be done with his property after death. Any person of legal age and sound mind can make a will. The primary purpose in making a will is to dispose of property at death in a manner that the owner wants.

By making a will, a person can decide for himself (1) who shall receive his property, (2) how much of it they shall receive, (3) how they shall own it and (4), to some extent, what they can do with it. A will has no effect during the life of the person who makes it. Only upon his death does the document become effective to carry out the desires and plans that he has expressed in the will.

A person who makes a will is called a *testator*. If a person dies and leaves a will disposing of his property, he is said to have died *testate*. A person who dies without a will dies *intestate*.

The next article in this series (page 7, this issue) outlines the

rigid and inflexible way in which property is distributed under the statutory laws of descent when a person dies intestate. Only by a will or some other advance property transfer arrangement can a person set up his own laws of descent. How is this done?

Few Limitations . . .

The law is remarkably free of restrictions on a person's right to dispose of his property by a will. Only a few restrictions exist.

The most important limitation prevents a person from depriving a surviving husband or wife of a share in the property. If a will gives a spouse less than he or she would be entitled to as "dower" (the share the husband or wife would take by intestacy if a spouse and children survived), the spouse may reject the will and take the share that the law would give. The will, however, would still govern the distribution of property insofar as other persons are concerned.

This freedom of disposition—the power to make a plan during life to be carried out after death—can be enjoyed only by making a will. If a person dies without making a will, he has no control

over the rigid scheme by which the law will distribute his property. By making a will, he actually makes his own "laws" by which his property will be managed, distributed and controlled after his death.

"Almost Everyone" . . .

Who should make a will? Almost everyone. The statutory scheme may work out for a few people. But most persons have thoughts and desires about their property after death that the statutory scheme doesn't consider. Reasoning that wills are only for the old and wealthy leads to serious problems. Here's why:

Size of estate: Any property constitutes an estate. With smaller estates it's often very important to avoid the statutory scheme, because it may chop the property into small units. If the amount of property is small, even greater care should be taken to provide for a spouse and children by sound planning. As the estate becomes larger, a will becomes important in conserving the property and transferring it with the least possible loss at death. Also the owner of property in this case may determine in his will the most ef-

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ficient division of the property. Anyone farming, for instance, in this day and age has more than enough property to justify a will.

Age: Except for the probability of natural death, a young person runs about the same risks as does an older person. The things that each may want after death may differ, but each should use a will to set out his desires. Both old and young can do great harm to their families by inaction in this matter—failing to plan for the distribution of their property in the event of death. Because the older person usually has more property, the difficulties that result from his failure to act are more often apparent. But the lack of property transfer planning may leave the young husband's wife and children many problems that could otherwise be avoided.

Family circumstances: This is the most important thing to consider in deciding to make a will. If provisions and plans are to be made for particular members of the family or for particular family situations, a will must be used.

In Making a Will . . .

1. Consider all property owned: Land, personal effects, bonds, machinery, insurance, etc. and all property that may be inherited from someone else.

2. Consider all persons to be provided for: Wife, husband, farming son, other children, grandchildren, relatives, friends, church, charities, etc.

3. Decide, in a general way, what should be done: Consider a farm, for example. Should it be kept intact? Who will take over? What provision should be made for children who have left the farm? What provision for wife or husband? What will the wife's needs be? Is there an aged parent or a sick or crippled child to be provided for? There may be a family heirloom promised to the oldest daughter or some bonds to

go to a son. Perhaps the land should go to certain persons to be owned by them together. All of the ideas should be carefully thought out and the conclusions put down in writing.

This preliminary list will show what is owned, what the general objectives are and the specific things the owner would like to have happen. Then decide who will be asked to carry out the directions of the will. This is the person to be named executor of the will—the person who will carry out the plan after the death of the property owner.

The executor is a most important person. He will serve as the property manager, and it may be necessary to have someone to guide or advise the surviving spouse and children. Thus, he may also be the family counselor. Select him carefully.

4. Have the will properly prepared: Though the law places few limitations on a person's right to dispose of his property by will, it is very particular about the *formalities* of making a will. The requirements are designed to safeguard, in every way possible, against mistakes, misunderstandings or possible frauds that might occur after death. The law makes a person use great care in making gifts by will. As a result, when a good will is made, it's based on a sound plan and shows *exactly* what the owner wants.

The conclusions reached should be discussed in detail with the family lawyer. To prepare a good will, he must have all of the facts about the property, its value, its future possibilities. He needs specific information about the family and its members, their relationships, their abilities, their needs as well as about the owner's hopes, desires and plans. He is setting up a plan to be carried out after death. If the best possible job is to be done, he must have complete information so that he can prepare a careful plan based on full knowledge.

Remember that some property doesn't pass under a will. Insurance proceeds, for example, pass as directed by the beneficiary clause in the policy, and property held in joint tenancy passes to the survivor under the deed or other document that set up the joint holding. Thus, it's important to coordinate the distribution of property that passes by will and outside of the will.

After the will has been drawn, the attorney will have the will signed by the testator in the presence of two or three persons. They are witnesses to the fact that the owner signed this particular document as his will. Each witness will also sign a statement at the end of the will stating that he was present when the testator signed the will or acknowledged his signature.

It's wise, in choosing witnesses, to select younger persons who live in the neighborhood and who should still be around when the time comes for the will to be used. This provides witnesses who will be available after the death of the testator to prove to the court that this document is a will. A person mentioned in the will, however, must not be a witness.

Changing a Will . . .

A person may want to make changes in his will. One of the persons mentioned in the will may have died; some of the property specifically transferred by the will may be sold; or there may be changes in the federal or state tax laws that call for a change in the will. If a child is born after the will is made and no mention or provision is made in the will, the child takes a share of the property as if no will existed. Such occurrences could easily upset a plan. A will should be re-examined after the birth of each child to make sure that the new child has a place in the plan.

There are certain ways that a will can be changed. The law is

strict on this also. It isn't sufficient to draw a mark through a paragraph or to write the word "omit" across it. Such marks or writings as these that might seem to change a will actually do not. Likewise, writing extra words or lines on a will doesn't accomplish the desired changes either. There have been many cases where a person *thought* he had legally changed his will in these ways but was mistaken, and the property could not be disposed of as he wished.

If changes are to be made in a will, have them made by your lawyer. He will add a proper

codicil—a simple addition to the will. If substantial changes are to be made, a new will usually should be prepared. Any will should be reviewed periodically or after each change in the family or family fortunes to make sure that the plans are always up to date.

Safekeeping . . .

Once a will is made, it should be carefully preserved. The lawyer or some other responsible person should have an unsigned copy. The original, signed copy should be put in a safe place. It's

wise to tell someone in the family, or the executor named in the will, where the will is kept. This will avoid the problem of a "lost" will.

A will may also be filed in the office of the clerk of the district court in the county, sealed so that no one can read it. Iowa law requires the clerk to file it and preserve it until the maker dies or until he wants it back.

By making a good will that has been well thought out and carefully prepared, a person may be sure that his wishes as to his property will be carried out after his death.

Your Estate.

If You Don't Have a Will

When a person dies without a will, his property is distributed according to a rigid and inflexible scheme set up by law—regardless of the specific wishes he may have had. Here is what happens if there is no will.

by John C. O'Byrne and John F. Timmons

WHEN A PERSON dies without making a will, he is considered in law to have died *intestate*. Property owned at the time of death is distributed among spouse and heirs-at-law according to a *fixed plan* set out in the pro-

visions of the Iowa statutes. Unless there is a will, these statutory provisions control the method of distribution of an estate.

In almost every situation, a properly prepared will or a will coupled with some other transfer plan is a more effective implement of distribution than the statutory provisions. But it's important to understand what happens to property when there is no will. What happens to farm

and other property if the owners make no valid advance plans for its transfer?

What Property?

All real estate within the State of Iowa is subject to the Iowa laws of distribution—regardless of the owner's residence. Real property outside of Iowa is distributed according to the laws of the state in which it's located,

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